



The logo for TNG Consulting, featuring the letters 'TNG' in a bold, white, sans-serif font against a dark blue background. The 'G' is partially cut off on the right side.A horizontal bar with a color calibration pattern, including various shades of green, yellow, and red, used for color accuracy in printing or scanning.

Any advice or opinion provided during this training either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

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CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

All IA faculty members may offer examples that emulate the language and vocabulary Title IX practitioners encounter in their roles including slang, profanity, and other graphic or offensive language.

AGENDA

1 Title IX Basics

2 Decisionmaker Role

3 Due Process

4 Policy Definitions & Terminology

5 The Title IX Process

6 Bias, Conflicts of Interest, & Recusal

AGENDA

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Preparing for the Hearing

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Hearing Logistics

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Decision making Skills Part I

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Relevance Exercise

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Questioning & Decision making Skills Part II

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ATIA Consent Construct

AGENDA

13 Making a Decision

14 Appeals

15 Recordkeeping and Documentation

16 Scenarios (Time Permitting throughout)

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TIME NOTICE OF PROPOSED RULEMAKING 2022

TITLE IX REGULATIONS

Congress passed Title IX of the Education Amendments in 1972

Since 1980 the Department of Education's Office for Civil Rights (OCR) has had primary responsibility for enforcing Title IX

November 2018 OCR proposed the most detailed and comprehensive Title IX regulations to date¹

August 2019 Significant

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NPRM PROCESS TIMELINE

Official publication in the Federal Register July 12, 2022

Review and comment period

60 day comment period ends September 12, 2022

Submit comments to the Department of Education's Office for Civil Rights (OCR)

Final Rule expected to be issued in Spring 2023

Effective Date approximately Summer/Fall 2023

Watch for ADA webinars and other opportunities

There will be a separate NPRM for Athletics

PREPARING FOR IMPLEMENTATION

Must continue to fulfill obligations under the current regulations for the 2022-2023 academic year:

Anticipate OCR will expect schools to implement the new Title IX regulations before the start of the 2023-2024 academic year:

Steps to Take Now

Prepare to educate your community on the changes

Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)

Determine how you will manage policy changes

Plan for the training needs for your community

Consider state laws, court decisions, and other regulations that may affect your institutional approach





WHAT IS YOUR MISSION AS A DECISION MAKER?

Decisionmaker Responsibilities

Decisionmaker Competencies

HEARING OFFICER/DECISION MAKER RESPONSIBILITIES

**Rank your Top 3 responsibilities as a Decision maker:
Identify what you consider least important**

	<u>Your Rank</u>	<u>Group Rank</u>
Finding the truth	_____	_____
Providing a just result	_____	_____
Providing an educational process	_____	_____
Making a safe community	_____	_____
Upholding the institution's policy	_____	_____
Ensuring a fair process	_____	_____
Protecting the institution from liability	_____	_____
Punishing wrongdoing	_____	_____





WHEN AND HOW THE “DECISION MAKER” WORKS

Required live hearing for colleges and universities

May take place in person, however, must provide an option for a video conference

Key new element is that the parties may cross-examine each other and witnesses through an Advisor

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HEARING OFFICER/DECISION MAKER COMPETENCIES

Legal Landscape

Conduct/Disciplinary Process

Understanding

Investigations

Title IX & AWA

Requirements

Pre Hearing Evidence Review

Pre Hearing Investigation

Report Review

Critical Thinking Skills

How to Prepare for a Hearing

Hearing Decorum

Questioning Skills

Relevance

Weighting Evidence

HEARING OFFICER/DECISION MAKER COMPETENCIES (CONT)

Due Process and Fairness

Bias/Impartiality/Conflicts of Interest

Stalking/Sexual Assault/Harassment

Domestic/Dating Violence

Discrimination

Deliberation

Sanctioning/Remedies

Understanding the Appeal Process

Cultural Competency

Intersection with Mental Health Issues

Concurrent Criminal Prosecutions

Impact of Failing to Testify/Answer

Drawing Inferences?

Manage Accommodations During Process

Fixing Procedural Deviations

Managing Impact Statements

Writing Decisions/Rationales

Role in Appeal Process?



REMEMBER, YOU HAVEN'T
“S OAS

DUE PROCESS

Substantive Due Process

Procedural Due Process

Evidentiary Standards



“SUBSTANTIVE DUE PROCESS” - DUE PROCESS IN THE DECISION ITSELF

Due Process in Decision



DUE PROCESS PROCEDURAL RIGHTS IN 2020 TITLE IX REGULATIONS (CONT.)

Right to

Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare

Inspect and review evidence and draft investigation report before finalized

Right to argue for inclusion of “directly related” evidence at the hearing

Ask relevant questions of the other party and witnesses through an Advisor, in the presence of the Decision maker

EVIDENTIARY STANDARDS

Clear and convincing evidence: it is highly probable that policy was violated

Highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable

65% 75% 85% – part of the problem with this standard is there is no real consensus on how to quantify it

Preponderance of the evidence: it is “more likely than not” policy was violated

The only equitable standard

501% (50% plus a feather)

The “tipped scale”



THE “TITLE IX PROCESS”: WHAT HAPPENED BEFORE IT GOT TO A HEARING?

The General Phases of a Title IX Process

Ten Steps of an Investigation

Key Elements from the 2020 Title IX Regulations

THE PROCESS

10 STEPS OF AN INVESTIGATION

- 1 Receive Notice/Complaint**
- 2 Initial Assessment and Jurisdiction Determination**
- 3 Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)**
- 4 Notice of Investigation to Parties/Notice of Formal Allegation (“Charge”)**
- 5 Establish investigation strategy**
- 6 Formal comprehensive investigation**
 - Witness interviews**
 - Evidence gathering**

EVIDENCE AND REPORT REVIEW BY PARTIES

PART 1

Prior to the completion of the Investigation Report:

Evidence directly related to allegations must:

Be sent to each party and Advisor

Be in an electronic format or hard copy

Include evidence upon which the Recipient does not intend to rely

Include exculpatory and inculpatory evidence

Be made available at any hearing

After sending the evidence, the Investigator must:

Allow 10 days for written response

Consider response prior to completion of report

Source: 31CFR § 106.45(b)(5)(vi)

EVIDENCE & REPORT REVIEW BY PARTIES

PART 2

At least 10 days prior to making a determination regarding responsibility (hearing):

The final investigation report summarizing relevant evidence must be sent:

To each party and Advisor

In an electronic format or hard copy

For the parties' review and written response

Best Practice: Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties

For K-12 schools, with or without a live hearing this review is followed by, or in conjunction with, the exchange of relevant written questions and responses facilitated by the Decision maker

ADVISORS (CONT.)

Institutions may limit the role of Advisors during the hearing except for cross examination and conferring with the party

Advisors chosen by the party should conduct cross examination



TRAINING MANDATES

The definition of sexual harassment in 34 CFR § 106.30

How to apply definitions used by the Recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of CFR § 106.45

Understanding the scope of the Recipient's education program or activity

How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes

TRAINING MANDATES (CONT)

How to serve impartially, by avoiding prejudice of the facts at issue, conflicts of interest, and bias

Any technology to be used at a live hearing

Issues of relevance of questions and evidence

Issues of relevance to create an investigation report that fairly summarizes relevant evidence

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LIVE HEARING

**Regulations mandate live hearing for higher education
Virtual hearings are permitted**

**Must create audio/audiovisual recording or transcript, of
hearing and make it available to the parties for inspection
and review**

**Must allow live cross examination to be conducted
exclusively by each party's Advisor (separate rooms still
allowed)**

Questions come from Advisors, panel (if any), and Chair

Will there be a facilitator role? Who? What do they do?

POLICY DEFINITIONS

Sexual Harassment (Umbrella category)

Sexual Harassment (offense)

Quid Pro Quo Sexual Harassment

Sexual Assault

Dating Violence

Domestic Violence

Stalking

Retaliation

SEXUAL HARASSMENT

Title IX regulations require each Recipient to define sexual harassment as conduct on the basis of sex that satisfies one or more of the following

Quid Pro Quo: An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct.

Hostile Environment: Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOC) that it effectively denies a person equal access to the Recipient's education program or activity

- Education program or activity means employment, too!

HOSTILE ENVIRONMENT: “UNWELCOME”

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

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HOSTILE ENVIRONMENT: “SEVERE”

Physical conduct is more likely to be severe without need for repetition

Sexual assault and many dating/domestic violence incidents are almost always sufficiently severe

Other physical conduct that does not meet the 34CFR § 106.30 definitions for sexual assault or dating/domestic violence may also rise to the level of “severe”

Consider the circumstances (eg, ability for Complainant to escape the harassment)

Assess whether accompanied by threats or violence

Assess whether there was a degree of embarrassment or humiliation



HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

There has been an increasing issue of conflating discomfort or being offended with the higher standard of sexual harassment. There is a high bar for meeting this definition

The circumstances to consider include:

The nature, pervasiveness, and severity of the conduct

Whether the conduct was reasonably physically threatening

Whether the conduct was objectively and subjectively humiliating

The objective and subjective reasonable effect on the Complainant's mental or emotional state

Effective denial of education or employment access

2 i OO) a discriminatory effect is presumed (proven)

PUTTING IT ALL TOGETHER: HOSTILE ENVIRONMENT SEXUAL HARASSMENT

The role of the Decision maker is to determine whether all the elements of a hostile environment are present

Requires a “totality of the circumstances” analysis, which is the key role for the Decision maker

When conduct does not meet the elements, applying the standard of evidence, then the Respondent is “not responsible”

Hostile environment complaints may often, therefore, lend themselves to informal resolution processes and may not ultimately come before Decision makers, unless they are connected to other forms of sexual harassment, such as sexual assault, dating violence, domestic violence, and/or stalking

PUTTING IT ALL TOGETHER: HOSTILE ENVIRONMENT SEXUAL HARASSMENT (CONT.)

Remember that the sex, gender identity, gender expression, and/or sexual orientation of the individuals do not matter in how we apply the relevant evidence to the policy elements

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SEXUAL ASSAULT

Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.

Rape- Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.

Sodomy- Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (non consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

SEXUAL ASSAULT (CONT.)

Sexual Assault with an Object – The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (non consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Fondling – The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

CONSENT

Consent can be defined per state law or best practices

ATIA Model Definitions found in *IP2P or The Playbook*

Although the new regulatory definition of sexual assault is ostensibly consent based, it's not a great analytical tool.

Luckily, the wording is generic enough to permit ATIA best practice interpretations to be fully applicable.

The FBI's definition of rape (upon which the regulatory definition rests) now incorporates the term 'canal knowledge'

DATING VIOLENCE

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—

Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

Dating violence does not include acts covered under the definition of domestic violence.

DOMESTIC VIOLENCE

A felony or misdemeanor crime of violence committed—

By a current or former spouse or intimate partner of the Complainant;

By a person with whom the Complainant shares a child in common;

By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;

By a person similarly situated to a spouse of the Complainant under the domestic or family law of the State in which the crime occurred;

DOMESTIC VIOLENCE (CONT.)

To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates

The people cohabitating must be current or former spouses or have an intimate relationship

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STALKING

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

**Fear for the person's safety or the safety of others, or
Suffers substantial emotional distress**

For the purposes of this definition

Course of conduct means two or more acts, including but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

OTHER TITLE IX MODEL DEFINITIONS: SEXUAL EXPLOITATION

Though not part of the Title IX “Sexual Harassment” definition, other conduct could be prohibited under an institutional sexual misconduct policy, including

Sexual Exploitation an individual taking non consensual or abusive sexual advantage of another for their own benefit or for the benefit of anyone other than the person being exploited, and that behavior does not otherwise constitute sexual harassment.

Examples include, but are not limited to

Sexual voyeurism

Invasion of sexual privacy (eg, doxing)

Knowingly making an unwelcome disclosure of (or threatening to disclose) an individual's sexual orientation, gender identity, or gender expression

ATIA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

Taking pictures, video, or audio recording of another in a sexual

ATIX MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

Causing or attempting to cause the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity, or for the purpose of making that person vulnerable to non-consensual sexual activity

Misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual connections (e.g., spoofing)

Forcing a person to take an action against that person's will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity

OTHER SEX-BASED MISCONDUCT OFFENSES THAT MAY BE ADDRESSED BY POLICY

Bullying/cyberbullying

Hazing

Threatening or causing physical harm

**Conduct which threatens or endangers the health or safety
of any person**

Discrimination

Intimidation

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RETRIBUTION

No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual has made a report or complaint,

RETRIBUTION

BASIC LEGAL PRINCIPLES

Protected activity under Title IX

Reporting sex discrimination



ELEMENTS AND ANALYSIS OF A RETALIATION CLAIM

The following elements establish an inference of retaliation

1 Did the individual engage in protected activity?

Usually straightforward,

**Unless there is a question of reasonableness of belief or
manner:**

2 Was the individual subsequently subjected to adverse action?

RETALIATION AND ADVERSE ACTION

Common definition of adverse action

Significantly disadvantages or restricts the individual as to their status as students or employees, or their ability to gain the benefits or opportunities of the program

Precluded from their discrimination claims

Reasonably acted or could act as a deterrent to further protected activity

The U.S. Supreme Court and the federal courts have defined adverse action very broadly.

BIAS, CONFLICTS OF INTEREST, & RECUSAL

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Among the most significant problems for Decision makers

Bias can represent any variable that improperly influences a decision

Forms of bias and prejudice that can impact decisions:

The determined outcome

Partisan approach by Investigators in questioning analysis, or report

Partisan approach by Decision makers in questioning findings, or sanctions

Intervention by senior level administrators or external sources

BIAS (CONT.)

Not staying in your lane

Inproper application of institutional policies or procedures

BIAS AND CONFLICTS OF INTEREST

Types of conflicts/bias

Wearing too many hats in the process

Legal counsel as Investigator or Decision maker

Decision maker who is not impartial

Biased training materials; reliance on sex or gender stereotypes

Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised

Having previously disciplined a student or an employee is often not enough to create a conflict of interest

RECUSAL

A conflict of interest might necessitate recusal, or party may request it

Identify and train an alternate Decision maker/Chair

Procedures should define the process and circumstances by which a party may seek to recuse a Decision maker

Typically, the Title IX Coordinator determines whether recusal is necessary

If you feel you cannot hear a case impartially, notify Title IX Coordinator immediately

PREPARING FOR THE HEARING



MUST DO PREP FOR THE HEARING (CONT.)

Decision Makers Must Thoroughly Review All Materials:

Recommend you review materials multiple times

Note all areas of consistency/undisputed information

- Oftentimes not require questions in hearing

Note all areas of inconsistency/disputed information

- These should be the main focus of questioning

Prepare questions in advance

Will have more questions arise, but be prepared going in, no matter how experienced you are



DAY OF THE HEARING

Dress professionally, layer if needed

Arrive prepared and ready

Bring snacks and water/drinks

Silence or turn off your phone and put it away

Bring a pen and paper or note taking device

Less is better; note what you need to make a determination

Be clear on policy/expectations for keeping/destroying written notes

Clear calendar after the hearing – deliberation could take as few as 30 minutes or it could take much longer

QUICKTIPS ON HEARING LOGISTICS

THE HEARING GENERAL LOGISTICS

Recording

**How by whom, etc
Redundant devices?**

**Attendance by parties and
witnesses**

Location and room set-up

**Comfort items (water,
tissues, meals if
needed)**

**Privacy concerns; sound
machine**

Seating arrangements

Materials

**Access to administrative
support if needed (phones,
copies, email)**

Advisors

**Parties and witnesses
waiting to testify**

Breaks

Use of AV

Waiting for a decision

HEARING DECORUM

Be professional, but avoid lawyer like approach

This is not court – this is an administrative process at a school

You are not cross examining or interrogating you are striving to determine whether the Respondent(s) violated institutional policy

Be respectful

Tone, manner, questioning

Sarcasm or being snide is never appropriate

Maintain your composure

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HEARING DECORUM (CONT)

Work to establish a baseline of relaxed conversation for everyone in the room

Use active listening skills

Listen carefully to everything that is said

Try not to write too much when people are talking



EVIDENCE

No restriction on parties discussing case or gathering evidence

Equal opportunity to

Present witnesses, including experts

Present evidence

Inspect all evidence, including evidence not used to support determination

Institution cannot limit types/amount of evidence that may be offered except that it must be relevant

Parties may have access to all gathered evidence that “directly relates” to the allegations available for reference and use at the hearing but they must make the case for its relevance

ASKYOURSELF

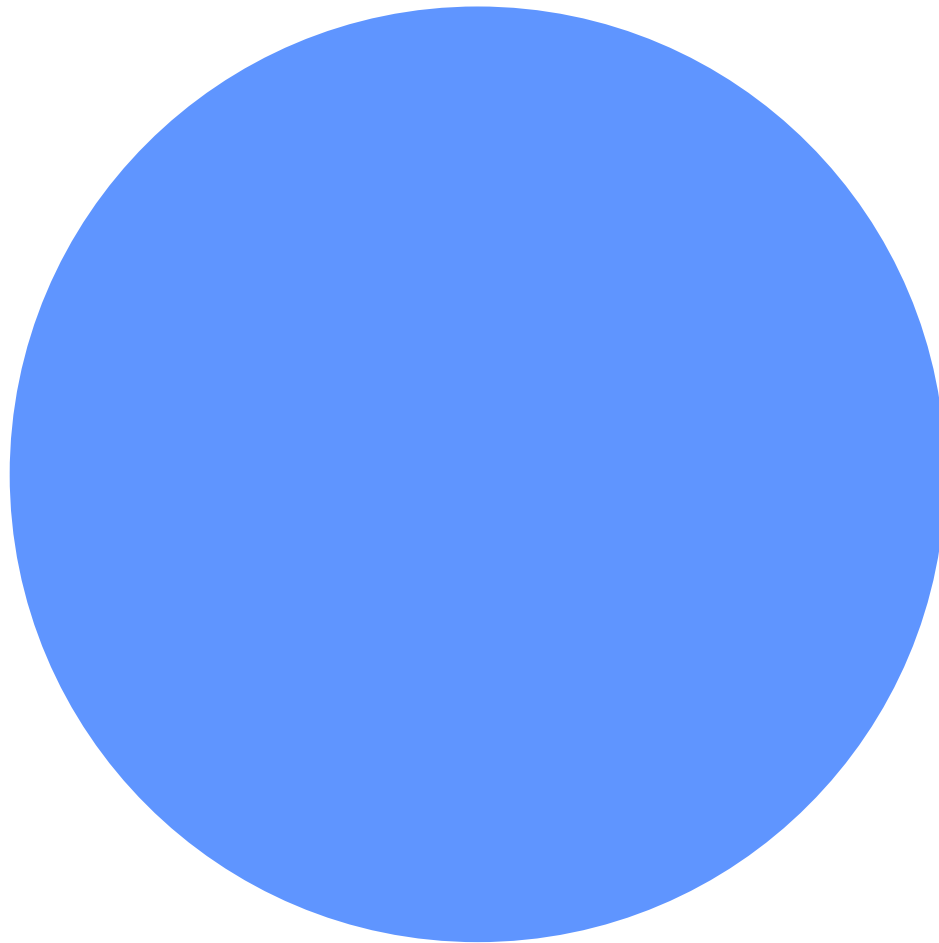
Is it relevant?

Is it reliable?
(Is it credible?)

Will we rely upon it
as evidence
supporting a
rationale/the written
determination?



UNDERSTANDING EVIDENCE



RELEVANCE

Evidence is generally considered relevant if it has value in



BUCKET 3 NEITHER RELEVANT NOR DIRECTLY RELATED EVIDENCE

3

**Evidence
Neither
Relevant nor
Directly
Related to the
Complaint**

**Evidence should be
maintained by the
Investigator(s) but disregarded
for purposes of the process**

**Parties/Advisors/Decision
makers don't get to know
about it**

**Redact from evidence files
shared with the
parties/Advisors/Decision
makers**

WEIGHTING EVIDENCE

Decision maker may consider and assign weight to different types of evidence, when relevant and credible (see next slide)

Decision makers should typically only consider impact statements during sanctioning

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**Documentary
Evidence**

eg, supportive writings or documents

Electronic Evidence

eg, photos, text messages, and videos

Real Evidence

i.e., physical objects

**Direct or Testimonial
Evidence**

eg, personal observation or experience

**Circumstantial
Evidence**

i.e., not eyewitness, but compelling

Hearsay Evidence

eg, statement made outside the hearing but presented as important information

Character Evidence

subject to relevance determination, often not probative of the underlying allegation







RELEVANCE EXERCISES

Kanand Junita

Further Exercises

CASE STUDY: IVAN & JUANITA

Juanita, a first-year member of the women's soccer team, made a Title IX complaint directly to the Title IX Coordinator:

On the morning of October 11, her teammate, who was checking her email in the computer lab, yelled for Juanita to come and look at something on the computer:

Juanita saw an email sent from the men's soccer team email address, menssoccer@school.edu, which said, "Greetings new freshman, meet the girl next door."



CASE STUDY: IVAN & JUANITA

Ivan told the investigator that he believes Juanita is blowing the whole matter out of proportion

He admits to creating the photo for a class project. He reports

“It was only meant to be a joke. I never put her name on it, so what’s the big deal? This is a work of art that I created for my class, not a pomp picture or anything. I only showed my artwork, which by the way is protected by the First Amendment, to a few of my teammates. I know my rights very well since my dad is a lawyer. In fact, the First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

CASE STUDY: IVAN & JUANITA

Ivan stated that he showed the photo to a couple of

CASE STUDY: IVAN & JUANITA

The picture was inserted into the email via a flash drive, and he was unable to determine which student had logged into the computer.

The assistant director received Ivan's consent to inspect his laptop. The photo was on his hard drive but was not sent out via email to anyone.

Ivan said that when he doesn't have his laptop with him, it is typically inside his locker. Ivan also told the assistant director that he hasn't given anyone else his laptop password.

CASE STUDY: IVAN & JUANITA

You are the Chair of the Hearing Panel. You must determine whether each specific piece of evidence is relevant.

Starting with evidence from the investigation report. Is it relevant that:

- 1 Ivan is a member of the men's soccer team**
- 2 Juanita is a member of the women's soccer team**
- 3 There was "history" between Ivan and Juanita**
- 4 Juanita called Ivan "a loser" earlier in the year in front of his friends**
- 5 Ivan admitted to creating the image for his class**
- 6 Ivan showed the image to a few teammates**
- 7 The image was sent from a computer lab computer**
- 8 Ivan consented to letting IT staff inspect his laptop**

CASE STUDY: IVAN & JUANITA

- 3 Ivan's high school soccer coach has prepared a written character reference for Ivan, stating that he was an upstanding member of his high school team and community, a four-year leader on the squad, and volunteered many times at the local YMCA youth program.**
- 4 Ivan stated that at the time that the email was sent, he was attending his political science class, which had an in-class exam that day.**
- 5 Juanita provided a screenshot of Ivan's Twitter feed, which showed that he retweeted an announcement from his favorite band just two minutes prior to the precise time that the email was sent.**
- 6 Ivan's Advisor wants to ask Juanita about her academic progress during the fall term. Ivan and his Advisor believe that Juanita was in danger of failing her chemistry course.**

RELEVANT OR DIRECTLY RELATED?

A Complainant writes in their formal complaint that they have been experiencing significant mental health issues since being sexually assaulted, including PTSD (self diagnosis). Respondent mentions this at the hearing to argue that one of the reasons Complainant likely misperceived the incident as non consensual is because they have a self admitted history of serious mental health concerns

**RELEVANT? DIRECTLY RELATED? NEITHER?
WHICH AND WHY?**





IF YOU STILL HAVE TO ASK A QUESTION ASK YOURSELF

Is the answer already in the report or documentation I have been provided?

If not, why not? (Ask the Investigator for this!)

You still will need to ask it again but keep the report in mind

What do I need to know?

Who is the best person to ask this of?

- Usually it will be the Investigator; first, and then the original source, if available**
- It may be good to ask the Investigator if they asked it already and what answer they previously received**

IF YOU STILL HAVE TO ASK A QUESTION ASK YOURSELF (CONT.)

Why do I need to know it?

It is not going to help you decide whether a policy was violated or not and you can explain how then it is not a good question (though you may not know this until you hear the answer).

What is the best way to ask the question?

Are you the best person to ask this question?



QUESTIONING SKILLS

Listen carefully and adapt followup questions

Work from your prepared outline but stay flexible

Seek to clarify terms (when the report is silent) that can have multiple meanings or a spectrum of meanings such as “hooked up,” “dunk,” “sex,” “acted weird,” “sketchy,” or “had a few drinks.”

Be cognizant of the difference between what was “heard” (hearsay), what can be assumed (circumstantial), and what was “witnessed” (facts).

Be aware of your own body language. Stay neutral, even if you hear something you distrust or dislike.



QUESTIONING & ACTIVITY

QUESTIONING ACTIVITY

Refer back to the Ivan and Juanita case and develop possible questions for the following

Questions for the Investigator

Questions for Juanita (Complainant)

Questions for Ivan (Respondent)

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QUESTIONING & CROSS EXAMINATION (CONT.)

A party or witness may choose to not answer one or more questions

The Decision maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

What is an inference?

How does it work?



WHAT'S CREDIBILITY?

Primary factors: corroboration and consistency

Accuracy and reliability of information

Decision makers must determine the credibility of testimony and evidence, and hence its reliability

“Credible” is not synonymous with “truthful”

Memory errors, evasion, misleading may impact credibility

Avoid too much focus on irrelevant inconsistencies

Source + content + plausibility

Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness

CREDIBILITY

Inherent Plausibility

“Does this make sense?”

**Be careful of bias influencing sense of
“logical”**

Motive to Falsify

Do they have a reason to lie?

Corroboration

**Aligned testimony and/or physical
evidence**

Past Record

Is there a history of similar behavior?

Demeanor (use caution!)

Do they seem to be telling the truth?

Enforcement Guidance

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility



FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

Strongest indicator of credibility

Independent, objective authentication

Party says they went to dinner; provides receipt

Party describes text conversation, provides screenshots

Corroboration of central vs environmental facts

Not simply alignment with friendly witnesses

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

Can include contemporaneous witness accounts

More “separate” the witness, greater the credibility boost

Outcry witnesses

Does what party said then

q





CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

Regulations permit Investigators to make credibility recommendations

Can serve as a road map for Decision maker but is not binding

Language in an investigation report may look like this

“Decision makers will want to carefully review Mary’s testimony as to whether the conduct was welcome, in light of the testimony of W1.”

“Decision makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first.”

CREDIBILITY IN THE HEARING

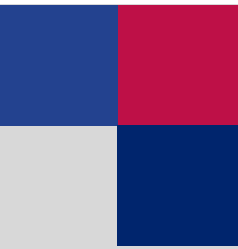
Distinguish performance/presentation skills from believability

Evidence requiring a credibility assessment should be examined in a hearing

Fundamental to due process

Failure of a witness/party to participate undermines ability to fully assess credibility

- Other evidence can be considered**
- What will the effect of that be on the process/decision?**



AIIXA CONSENT CONSTRUCT

Force
Incapacity
Consent

CONSENT

Informed, knowing and voluntary (freely given)

Active (not passive)

Creates mutually understandable permission regarding the conditions of sexual activity

No means no, but nothing also means no. Silence and passivity do not equal consent.

To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity

Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non verbally

OVERVIEW OF THE THREE QUESTIONS

- 1 Was force used by the Respondent to obtain sexual or intimate access?**
- 2 Was the Complainant incapacitated?**
 - a If so, did the Respondent know or**
 - b Should the Respondent have known that the Complainant was incapacitated**

Note: The intoxication of the Respondent cannot be used as a reason they did not know of the Complainant's incapacity.

- 3 What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?**

FORCE

1. Was force used by the Respondent to obtain sexual or intimate access?

Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force

Consider the impact of power dynamics

NOT FOR DISTRIBUTION



FORCE (CONT.)

Types of force to consider:

Intimidation an implied threat that menaces and/or causes reasonable fear:

This requires the same threat analysis as above

Coercion the application of an unreasonable amount of pressure for sexual access

Consider isolation, frequency, intensity, and duration

INCAPACITY

2 Was the Complainant incapacitated?

Incapacity impaired, drunk, intoxicated, or under the influence

What was the status of the Complainant in terms of:

Situational awareness

Consequential awareness

What was the reason for incapacity?

Alcohol or other drugs (prescription or non prescription)

Mental/cognitive impairment

Injury

Asleep or unconscious

INCAPACITY (CONT.)

Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent

Incapacitation is a determination that will be made after the incident in light of all the facts available

Blackouts are frequent issues

Blackout incapacitation (automatically)

Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how

Partial blackout must be assessed as well

BEHAVIORAL CUES

Evidence of incapacity context cues:

Slurred speech

The smell of alcohol on the breath in combination with other factors

Shaky equilibrium, stumbling

Passing out

Throwing up

Appearing disoriented

Unconsciousness

Known blackout

Outrageous or unusual behavior (requires prior knowledge)





CONSENT ANALYSIS

3 What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

Is there any sexual or intimate pattern or history between the parties?

What verbal and/or non verbal cues were present during any acts that the parties agree were consensual?

This is where getting detail and specifics of intimate behaviors is critical

MAKING A DECISION

Deliberations

Sanctioning

Written Determinations

DELIBERATIONS

General Information

DELIBERATIONS

Foundation for Decisions

Decisions must be based only upon information/evidence in the investigation report or presented at the hearing

Don't turn to any outside "evidence"

Parse the policy (break it down by its constituent elements)

Assess evidentiary weight. Measure with the following questions

Is the question answered with fact(s)?

Is the question answered with opinion(s)?

Is the question answered with circumstantial evidence?

DELIBERATIONS

Findings, Impact Information, and Sanctions

Separate the “Finding” from the “Sanction”

Do not use impact-based rationales for findings (e.g., intent, impact on the Complainant, impact on the Respondent)

Use impact-based rationales/evidence of e e e ref

SANCTIONING IN SEXUAL MISCONDUCT CASES

Title IX and case law require:

Decision makers should also decide sanction if credibility will influence the sanction

Recipients to act reasonably to bring an end to the discriminatory conduct (Stop)

Recipients to act reasonably to prevent the future recurrence of the discriminatory conduct (Prevent)

Recipients to restore the Complainant as best they can to their pre-deprivation status (Remedy)

This may create a dash if the sanctions only focus on educational and developmental aspects

Sanctions for serious sexual misconduct should not be developmental as their primary purpose

COMMON STUDENT SANCTIONS

Warning

Probation

Loss of privileges

Counseling

No contact

**Residence hall relocation,
suspension, or expulsion**

Limited access to campus

Service hours

Online education

Parental notification

**Alcohol and drug
assessment, and
counseling**

Discretionary sanctions

College suspension

College expulsion

WRITTEN DETERMINATIONS (CONT.)

Sanctions imposed on Respondent (if any) and rationale for sanctions chosen (or sanctions not chosen)

Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the Recipient to the Complainant

Procedures and bases for any appeal

The Decision makers should author the written determination

May follow a template provided by the Title IX Coordinator

WRITTEN DETERMINATIONS: LOGISTICS

The written determinations should be provided to the parties simultaneously

The determination becomes final either on the date that the Recipient provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely

FERPA cannot be construed to conflict with or prevent compliance with Title IX

Will this letter be reviewed by the Title IX Coordinator and/or legal counsel?

APPEALS

Elements Under the 2010 Regulations

Grounds for Appeal

Process Flowchart

Other AIAA Recommendations

APPEAL RESPONSE

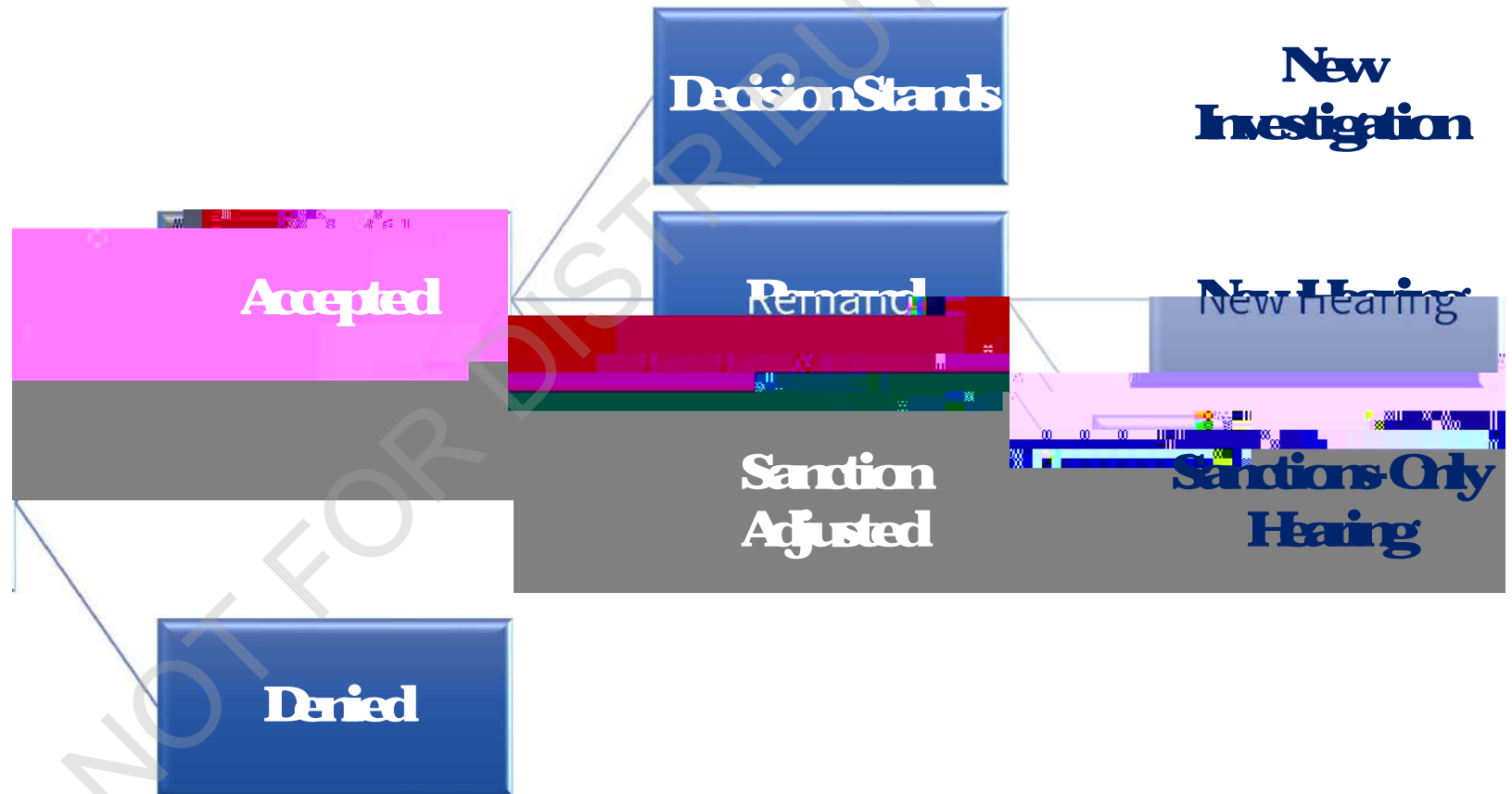
When an appeal is filed, the Recipient must notify the other party and implement appeal procedures equally for all parties

Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome

The Chair may be called upon by the Appeal Decision maker > info° the he/ heCha s



APPEALS: THE PROCESS



APPEALS: OTHER ATIXA RECOMMENDATIONS

One level of appeal

Short window to request an appeal

May always grant an extension if necessary

Document-based and recording review

NOT de novo

In other words, not a “second bite of the apple”

Deference to original Decision maker(s)

RECORD KEEPING AND DOCUMENTATION





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